(24,940)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 657.

MAX JAFFE ET AL., SURVIVING MEMBERS OF THE FIRM OF KNAUTH, NACHOD & KUHNE, APPELLANTS,

vs.

MAURICE E. A. WESTPHALEN ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF FLORIDA.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 9, 1915.

Amended Bill. 1

District Court of the United States,

NORTHERN DISTRICT OF FLORIDA.

FRIEDRICH NACHOD, MAX JAFFE, WILHELM KNAUTH, AUGUST STERN, OSCAR L. GUBELMAN, AREND H. WEINGARDT, ROLLIN C. NEWTON, MARY W. KNAUTH, and PERCIVAL KUHNE, Complainants,	
AGAINST	In Equity. 2
MAURICE E. A. WESTPHALEN; MADAM MCLEOD WESTPHALEN; WILLIAM S. LOVELL, as Trustee in Bankruptcy of the Estate of KNIGHT, YANCEY & COMPANY; and LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendants.	

The complainants above named, Knauth, Nachod & Kuhne, make this their amended bill of complaint (or whatever it should be denominated) against the defendants above named and allege, on information and belief: 3

FIRST—NAME ETC., OF PARTIES.

1. The complainants are copartners in business, doing business as international bankers and maintaining a banking house at New York, N. Y., and at Leipzig, Germany, under the firm name and style of Knauth, Nachod & Kuhne. Said Friedrich Nachod, Max Jaffe and August Stern are citizens or subjects of Germany and reside at Leipzig, Germany. Said Wilhelm Knauth

4 is a citizen or subject of Germany and resides at Arrochar, County of Richmond, City and State of New York. Said Arend H. Weingardt is a citizen or subject of Germany and resides at Montclair, Essex County, New Jersey. Said Oscar L. Gubelman is a citizen of the State of New Jersey and resides at West Orange, Essex County, New Jersey. Said Rollin C. Newton is a citizen of the State of New York and resides at Scarsdale, Westchester County, New York. Said Mary W. Knauth and Percival Kuhne are citizens of the State of New York and reside in the County, City and State of New York.

5 2. The defendants Maurice E. A. Westphalen and Madam McLeod Westphalen are copartners in business, the latter *in commendam*, doing business at Havre, France, under the firm name and style of Westphalen & Company. They are both citizens of the French Republic and reside at Havre, France. The defendant, William S. Lovell, as Trustee in Bankruptcy of Knight, Yancey & Company, is a citizen of the State of Alabama and resides at Birmingham, Jefferson County, Alabama, and was appointed as said Trustee by the United States District Court for the Northern District of Alabama, Northeastern Division. The bankrupts, Knight, Yancey & Company, were a copartnership firm and had their
6 general office at Decatur, Morgan County, Alabama, where the active partner, John W. Knight, resided and managed the business of the firm. The defendant Louisville & Nashville Railroad Company, is a corporation organized under the laws of the State of Kentucky and has its home office at Louisville, Ky., but it also does business and maintains a regular place of business at Pensacola, Florida.

SECOND—JURISDICTION.

1. On or about the 11th day of May, 1910, upon the petition of William S. Lovell and Clarence E. Frost,

as Receivers in Bankruptcy of Knight, Yancey & Company, and Joe T. Gibson, an unsecured creditor of said bankrupts, this Court duly granted an injunction order, in an ancillary bankruptcy proceeding in this Court, entitled "In the Matter of Knight, Yancey & Company, Bankrupts", by which order the Court enjoined and restrained the defendant Louisville & Nashville Railroad Company, among others, "from moving or in any way disposing of any cotton" in its possession or under its control, upon shipments by or for the account of Knight, Yancey & Company, and decreed that said railroad company was "required to hold said cotton pending the further orders of this Court." The cotton set forth in Schedule 1 hereto annexed and made a part hereof was among the cotton then in the possession of said railroad company at Pensacola, Florida, and under its control, upon shipments by and for the account of Knight, Yancey & Company. Said order was duly served on said railroad company and thereupon the Court acquired dominion over said cotton and the potentiality of possession thereof and the exclusive jurisdiction thereover. 7 8

2. The defendant, Louisville & Nashville Railroad Company refused, on demand, to deliver the cotton set forth in Schedule 1 hereto annexed to the defendants Westphalen & Company and based its refusal on said injunction order. Thereupon and on or about July 1, 1910, said defendants, Westphalen & Company, filed a petition to this Court for the release of the cotton set forth in said Schedule 1 hereto annexed. The defendant Lovell as Trustee and the defendant Louisville & Nashville Railroad Company both filed objections to the release of said cotton. The Court refused said application but granted said Westphalen & Company permission to institute suit in the United States Circuit Court, Northern District of Florida, to recover the same. Thereupon and on or about July 14, 1910, said Westphalen & Company instituted suit by filing a bill of complaint in equity in said Circuit Court against said Lovell as 9

said Trustee and said Louisville & Nashville Railroad Company to establish their title, ownership and right of possession in and to said cotton and to require the delivery of the genuine bills of lading therefor and of the cotton itself to them, said Westphalen & Company. Thereafter and without the consent of this Court or of said Circuit Court, said Westphalen & Company and said Lovell as Trustee and said Louisville & Nashville Railroad Company entered into an agreement, entitled in said suit in said Circuit Court and dated July 14, 1910, under which the cotton set forth in said Schedule 1 was delivered to said Lovell as temporary custodian and sold and the proceeds thereof deposited in the First National Bank of Pensacola, Florida, and the American National Bank of Pensacola, Florida. Said deposit was made in said banks in the matter of said suit in said Circuit Court and subject to the final judgment of the Court and to abide the final decree in said cause, or any other such causes as might finally determine the rights of the parties, and with every right, remedy, recourse and protection reserved to the parties which they could exercise if the cotton had not been sold. The proceeds of said cotton remains on deposit in said banks at Pensacola, Florida, on the said terms and conditions of said agreement. Said railroad company filed its answer to said bill about September 17, 1910. Said Trustee filed a demurrer to said bill of said Westphalen & Company on the merits thereof, about October 3, 1910. With the permission of this Court and on or about February 4, 1911, while the issue raised by said demurrer was undetermined, the complainants, Knauth, Nachod & Kuhne, obtained an order of said Circuit Court permitting them to file their bill of complaint herein as an original bill "in the nature of a cross-bill or otherwise."

3. The complainants, Knauth, Nachod & Kuhne, assert an interest in a part of said cotton or in the proceeds thereof that is prior and paramount both to that of said Westphalen & Company and to that of said

Lovell as Trustee. The property is in this district. The 13
matter in controversy exceeds the sum or value of three thousand dollars, exclusive of interest and costs, and arises under the Constitution and laws of the United States. The said suit instituted by Westphalen & Company was between citizens of a State and foreign citizens. This suit is between citizens of different States. Said Lovell as Trustee bases his claim on Section 70 and other provisions of the Bankruptcy Act. The complainants, Knauth, Nachod & Kuhne, base their claim on the laws of the United States, as well as the laws of different States, including Section 70 and other provisions of the Bankruptcy Act. So far as the complainants Knauth, Nachod & Kuhne are concerned, however, jurisdiction 14
is predicated, without waiving other grounds, on the fact that the Court, in equity, has impounded the subject matter or *res* of the controversy within its exclusive jurisdiction and that they have the right, therefore, to have their claim thereto heard and determined herein.

THIRD—FACTS.

1. During the period from the 5th to the 18th days of April, 1910, and prior thereto and thereafter until their adjudication of bankruptcy, John W. Knight, of Decatur, Alabama; William J. Yancey, of Memphis, Tennessee; William D. Nesbitt of Birmingham, Alabama; 15
and Robert H. Nesbitt, of Spartenburg, South Carolina, were co-partners in business doing business at Decatur, Alabama, under the firm name and style of Knight, Yancey & Company, as dealers in cotton. They also maintained branch offices at various other places, particularly at Selma, Ala., and Mobile, Ala. During the said period and until their adjudication of bankruptcy and down to the present time, said Knight, Yancey & Company were hopelessly insolvent and knew that they were insolvent and unable to pay their debts. All the acts of said Knight, Yancey & Company hereafter set forth were committed by them while insolvent and while

16 they knew that they were insolvent and unable to pay their honest debts.

2. During said period from the 5th to the 18th days of April, 1910, the firm of Knight, Yancey & Company caused to be issued and sent to New York, N. Y., some thirteen drafts or foreign bills of exchange to which were attached, among other things, thirteen export bills of lading purporting to show that thirteen hundred (1300) bales of cotton had been delivered by said Knight, Yancey & Company to common carriers for transportation to Liverpool, England, and to Bremen, Germany, and to Reval, Russia, or to other European ports, and
17 for delivery, at the various ports of destination, to the order of said Knight, Yancey & Company, some of said bills of lading purporting to have been issued by the Southern Railway Company and some purporting to have been issued by the Louisville & Nashville Railroad Company. Said drafts were drawn to the order of Knight, Yancey & Company; and the cotton mentioned in said bills of lading was to be delivered to the order of said Knight, Yancey & Company, and the insurance certificates thereto attached were payable, in case of loss, to said Knight, Yancey & Company; and all were indorsed by said Knight, Yancey & Company. Said drafts, bills of lading and other papers were forwarded to New York
18 for the purpose of having the same sold and delivered to the complainants, Knauth, Nachod & Kuhne, or other purchasers, as genuine and valid documents and with the intent that said Knauth, Nachod & Kuhne, or other purchasers, should be misled and deceived into the belief that the said bills of lading were genuine and represented actual shipments of the thirteen hundred (1300) bales of cotton therein mentioned and should purchase said foreign drafts on the strength of said bills of lading. Said Knauth, Nachod & Kuhne were in fact misled and deceived and did believe that said bills of lading were genuine and represented actual shipments of the thirteen

hundred (1300) bales of cotton therein mentioned; and, 19
on the faith thereof, took and received the said bills of lading with the drafts prefixed thereto and delivered over the sum of $98,005.58, except that $154.20 thereof were protest fees and cable charges subsequently paid on account of said drafts.

3. Some of said drafts matured ninety days after sight and the rest sixty days after sight. The following is a statement of the date of each of the said drafts; the date of each of the said bills of lading thereto attached; the number of bales and marks of the cotton; and the amount of each of the said drafts, your orators being ready to file a copy of said drafts and of the bills 20
of lading thereto annexed and to produce the originals thereof as the Court may direct, to wit:

Date of Draft, 1910.	Date of B/L 1910.	Number of Bales of Cotton and Marks.	Amount of Drafts.
April 9	April 9	100 PALM—Reichmarks	31,604.
" 9	" 9	100 QEKP— "	31,394.
" 9	" 9	100 RBUZ— "	31,650.
" 11	" 9	100 QNNN—Francs	38,924.
" 8	" 8	100 PAIY—Sterling	1571- 5- 8.
" 8	" 8	100 PUUN— "	5579-17-11.
" 8	" 8	100 QAAR— "	1560-18- 6.
" 8	" 8	100 QUHH— "	1574-13- 1.
" 8	" 8	100 RFFF— "	1574- 3- 1.
" 8	" 8	100 RUKR— "	1578- 3- 0.
" 8	" 7	100 QRRT— "	1548-15- 9.
" 8	" 7	100 QAJJ— "	1534-16- 7. 21
" 8	" 7	100 QFNK— "	1541- 8- 0.

4. The bills of lading annexed to said drafts were not signed or issued by the railroad companies mentioned therein. The cotton mentioned in said drafts and bills of lading was never delivered to the railroad companies. On the contrary, said bills of lading were signed either by said John W. Knight or other persons unknown at this time to said Knauth, Nachod & Kuhne. No cotton was ever delivered on said bills of lading by the carriers to complainants or to any one else as the indorsee of said Knight, Yancey & Company. The

22 drawers, Knight, Yancey & Company had not provided for the acceptance of said drafts and had not provided the drawees of said drafts with funds with which to pay the same. Said drafts were duly presented for acceptance, before said Knauth, Nachod & Kuhne had any knowledge of the said fraud, and acceptance thereof was refused. Said drafts were duly protested for non-acceptance and due notice thereof given to said Knight, Yancey & Company and to all other parties thereto, at an expense to said Knauth, Nachod & Kuhne, in protest fees and cable charges of $154.20. Neither said drafts nor said protest fees and cable charges, nor any part thereof, have ever been paid to the complainants, Knauth,
23 Nachod & Kuhne. Said Knight, Yancey & Company, and all other persons acting with them in the execution, issue and delivery of said instruments, knew at the time that no cotton had been delivered to the railroad companies and knew that said Knauth, Nachod & Kuhne, or other purchasers, would rely on the same as being genuine and representing actual shipments of cotton and knew that the said Knight, Yancey & Company were insolvent and had no means of repaying the money obtained on said instruments and committed all of said acts for the purpose of obtaining, on the strength of said false documents and said false and fraudulent representations, from said Knauth, Nachod & Kuhne, or
24 others, the said sum of $98,005.58. No cotton has ever been received by said Knauth, Nachod & Kuhne, or by any one else on account of the said bills of lading. Since the discovery of the said fraud, the complainants, Knauth, Nachod & Kuhne, have in no wise affirmed or ratified the transaction or transactions resulting in the delivery over of their said money to the said Knight, Yancey & Company; but, on the contrary, have sought to obtain and have demanded and hereby again demand the return to themselves, as the owners entitled thereto, of their said money (the amount being the sum of $98,-005.58) and demand that said Knight, Yancey & Company and their successors, including said William S.

Lovell as their trustee in bankruptcy, account for the 25
said money and for the cotton or other property paid for therewith, or with the proceeds thereof, and reimburse said Knauth, Nachod & Kuhne therefor, with interest thereon from April 18, 1910, at 8% per annum, the legal rate in Alabama. The complainants, Knauth, Nachod & Kuhne are ready, and hereby offer, to surrender the said drafts, bills of lading and other documents upon being reimbursed for the said $98,005.58, with interest; or upon such other terms as the Court shall decree.

5. The drafts herein before set forth were forwarded to New York, N. Y., and there sold by said Knight, Yancey & Company to the complainants, Knauth, Nachod 26
& Kuhne, through the instrumentality of the First National Bank of Decatur, Alabama, and its New York correspondent and one Frederick van Gerpen, as the agent and broker of said Knight, Yancey & Company. Said Knight, Yancey & Company utilized said instrumentalities for the further purpose of obtaining from said First National Bank of Decatur the allowance of over-drafts in payment of the price of cotton purchased by them. Said Knight, Yancey & Company was engaged in the business of buying and exporting cotton. On the days when said drafts were forwarded to New York, said Knight, Yancey & Company also drew certain drafts on said Frederick van Gerpen, in money of the United States, 27
which are hereafter referred to as "currency" drafts to contradistinguish them from said drafts in foreign money, hereafter referred to as "foreign" drafts. Said currency drafts, together with said foreign drafts and pretended bills of lading as collateral thereto, were deposited by said Knight, Yancey & Company in said First National Bank of Decatur for collection and as security for the repayment of certain over-drafts made by said Knight, Yancey & Company in payment of the price of certain cotton purchased by them. Said over-drafts were also secured by the pledge by said Knight, Yancey & Company of the

28 cotton paid for therewith or other cotton pledged in lieu thereof. Said over-drafts were allowed and said pledge effected by taking up drafts accepted by said Knight, Yancey & Company, with compress (Warehouse) receipts or bills of lading attached, and by the payment of checks for cotton on the delivery of compress receipts or bills of lading therefor. The allowance of said over-drafts on the pledge of the cotton thus paid for was in accord with the usages and custom of the business and said First National Bank of Decatur claims that it acted in good faith. The resources of the local banks were not adequate to finance the business by accepting a pledge of said foreign drafts, payable sixty and ninety days after
29 sight, and it was a usage and custom of the business to sell such foreign drafts in New York. Said currency drafts, with said foreign drafts and accompanying documents as collateral, were employed as a means both of obtaining and securing said overdrafts and of facilitating the remittance of the proceeds of said foreign drafts. Said First National Bank of Decatur also held as security for said over-drafts the acceptance, *pro forma*, of a third party, in compliance with the requirements of the Comptroller of the Currency, but the pledged cotton was regarded as the principal security. Said First National Bank of Decatur forwarded said currency drafts together with said foreign drafts and pretended bills of lading and
30 other documents as collateral thereto, to its correspondent in New York, N. Y., for collection and credit. On the arrival in New York of said currency drafts together with said foreign drafts and pretended bills of lading and accompanying documents, said foreign drafts and pretended bills of lading and accompanying documents were intrusted to said Frederick van Gerpen, as the agent or broker of said Knight, Yancey & Company, and by said broker or agent sold to the complainants, Knauth, Nachod & Kuhne, as hereinbefore set forth. Upon the sale thereof said Knauth, Nachod & Kuhne paid their money to said agent or broker of said Knight, Yancey & Company, upon the faith of said foreign drafts and pre-

tended bills of lading as hereinbefore set forth. Said 31
agent or broker of said Knight, Yancey & Company then took up said currency drafts with the money of said Knauth, Nachod & Kuhne and paid the amount thereof to said correspondent in New York of said First National Bank of Decatur together with certain moneys of said Knight, Yancey & Company. Said correspondent thereupon and on the days of the receipt of said moneys from said agent or broker placed the amount thereof, including the moneys of said Knauth, Nachod & Kuhne, to the credit of said First National Bank of Decatur, and notified said First National Bank of Decatur thereof by mail. Said notice was received by First National Bank of Decatur in due course of mail before business hours on 32
the second day thereafter. On receipt of said notices, if not before, said currency drafts were collected by said First National Bank of Decatur and the moneys, including the moneys of said Knauth, Nachod & Kuhne, were held for the account of said Knight, Yancey & Company subject to the repayment of said over-drafts.

6. During said period from the 5th to the 18th days of April, 1910, and prior thereto and thereafter, it was a usage and custom of the business between bankers and their customers in the State of Alabama, including Decatur, for customers, such as said Knight, Yancey & Company, to deposit drafts on out-of-town parties, such 33
as said currency drafts on Frederick van Gerpen, for collection and upon the understanding and agreement that the customer should retain the title until collection, remittance and receipt by the depositary bank. It was also a usage and custom of said business in the State of Alabama, including Decatur, for banks accepting such out-of-town drafts for collection, including said First National Bank of Decatur, to direct their collecting correspondent, particularly when collection was made in New York, N. Y., to credit the depositary bank with the proceeds thereof and to hold itself ready to pay the amount of said proceeds to or for the account of its

customer upon receipt of notice of the collection thereof. During said period from the 5th to the 18th days of April, 1910, and prior thereto and thereafter, it was the law in the State of Alabama and generally in this country, particularly throughout the South, that a deposit in a bank of drafts upon out-of-town parties was for the purpose of collection; that the title to the instrument remained in the depositor until collection; that the title to the proceeds remained in the depositor until remittance and receipt by the depositary bank; and that, in cases of collection and credit by a collecting correspondent of the depositary bank, the collection was completed and the money deemed to be received by the depositary bank on receipt of notice that the draft had been collected and credited by such correspondent.

7. After said First National Bank of Decatur had received said moneys, including the moneys of said Knauth, Nachod & Kuhne, the same were all disbursed by said bank, at the instance of said Knight, Yancey & Company, in the purchase and redemption of certain cotton, including a part of the cotton or the bills of lading therefor set forth in Schedule 1 hereto annexed. Said Schedule 1 hereto annexed includes certain cotton or the bills of lading therefor, exceeding three thousand dollars in value, that was thus purchased and redeemed with said moneys of said Knauth, Nachod & Kuhne. The proceeds of the cotton set forth in said Schedule 1 hereto annexed remains on deposit at Pensacola, Florida, as hereinbefore set forth and, being in part the proceeds of said moneys obtained by said false pretenses and no right of a purchaser for value and without notice having intervened, are subject to a trust or charge in favor of said Knauth, Nachod & Kuhne, to the extent that it was purchased or redeemed with their said moneys or with the fund, including their said moneys, that was remitted to the First National Bank of Decatur as before set forth.

8. On or about the 20th day of April, 1910, said firm 37
of Knight, Yancey & Company was duly adjudicated a bankrupt and on or about the 21st day of April, 1910, Clarence E. Frost and William S. Lovell were appointed Receivers in Bankruptcy of the estate of said firm and qualified, by giving the prescribed bond, and entered upon the performance of their duties as such Receivers. On or about the 26th day of May, 1910, the defendant William S. Lovell was duly appointed trustee in bankruptcy for the estate of said firm and qualified, by giving the prescribed bond, and entered upon the performance of his duties as such Trustee. Neither the said Knight, Yancey & Company nor their Receivers nor their Trustee, nor any one else, have returned to the said Knauth, Nachod 38
& Kuhne said $98,005.58, or any part thereof. Said William S. Lovell is still acting as said Trustee.

9. The defendants Westphalen & Company, by their bill of complaint in said suit in said Circuit Court, claim that the cotton set forth in Schedule 1 hereto annexed was transferred to them, by the shipment thereof by said Knight, Yancey & Company, in payment or fulfillment of an antecedent indebtedness or obligation of said Knight, Yancey & Company to said Westphalen & Company. The fact is that said cotton was shipped to Havre, France, to be there delivered to said Knight, Yancey & Company or their order. The bills of lading therefor ran 39
to said Knight, Yancey & Company or order as consignees and provided that notice of the arrival of said cotton at said port should be given to Messrs. Scheuch & Company. Any rights that said Westphalen & Company have in said cotton are derived from said Scheuch & Company. The bills of lading for said cotton were never delivered however, by said Knight, Yancey & Company to said Westphalen & Company but were retained by them and, after their adjudication of bankruptcy, were delivered to the defendant Lovell as Trustee. The shipment of said cotton was made while said Knight, Yancey & Company were insolvent and within four months before the filing of the

40 petition for the adjudication of bankruptcy; and the effect of the enforcement of any transfer to said Westphalen & Company, by shipment or otherwise, will be to enable them to obtain a greater percentage of their debt than any other creditors of the same class. At the times of shipment of said cotton, said Scheuch & Company and Westphalen & Company had reasonable cause to believe, and did in fact believe, that a transfer, if any, of said cotton was intended by said Knight, Yancey & Company to give them a preference over other creditors of the same class. Neither the said Westphalen & Company nor said Scheuch & Company extended any further credit or parted with any further value, in good faith or otherwise, on
41 account of the shipment or any other act of said Knight, Yancey & Company by which it is claimed that a transfer or application of said cotton to the payment of said antecedent indebtedness or obligation was made. Said Westphalen & Company do not come into equity with clean hands, in that regard at least. The shipment and any other act respecting a transfer or application, if any, of the cotton set forth in Schedule 1 hereto annexed to the payment or fulfillment of said antecedent indebtedness or obligation, was made within four months prior to the filing of the petition for adjudication of bankruptcy and with the intent and purpose on the part of said Knight, Yancey & Company to hinder, delay and defraud their
42 other creditors, including said Knauth, Nachod & Kuhne with whose money a part of said cotton or the bills of lading therefor was purchased and redeemed, and neither said Scheuch & Company nor said Westphalen & Company were purchasers in good faith or for a present fair consideration or upon the parting with any new consideration or value of any kind.

10. The defendant, William S. Lovell as Trustee in Bankruptcy of Knight, Yancey & Company, sets up, in his answer to the said bill of complaint of said Westphalen & Company in said suit in said Circuit Court, that he is the owner and holder of the bills of lading for

the cotton set forth in Schedule 1 hereto annexed; also 43
that the shipment thereof and all other acts of Knight, Yancey & Company respecting a transfer, if any, of said cotton to said Westphalen & Company were under facts and circumstances such as are hereinbefore set forth as constituting a voidable preference. Said Trustee elects in said answer to avoid any such transfer and asks that the same be decreed void and that the title to said cotton and to the proceeds thereof be decreed to have vested in him, said William S. Lovell as Trustee in Bankruptcy of Knight, Yancey & Company.

11. The bankrupts, Knight, Yancey & Company, obtained the moneys of the complainant, Knauth, Nachod 44
& Kuhne, by false pretenses and held the same in trust for their benefit. Said bankrupts also held the entire fund or bank credit including said moneys subject to a trust or charge for their benefit. Said bankrupts then disbursed said entire fund or bank credit, including the moneys of said Knauth, Nachod & Kuhne, in the purchase and redemption of certain cotton and then held the cotton thus purchased and redeemed subject to a trust or charge for the benefit of said Knauth, Nachod & Kuhne. To the extent of said Ninety-eight thousand five and 58/100 dollars ($98,005.58) and interest thereon from April 18, 1910, said cotton and the proceeds thereof equitably belongs to said Knauth, Nachod & Kuhne. 45
The defendant William S. Lovell as Trustee in Bankruptcy of Knight, Yancey & Company stands merely in the place and stead of said bankrupts. Said Trustee has acquired or claims all of said cotton thus purchased and redeemed. The complainants, Knauth, Nachod & Kuhne, duly rescinded and do hereby again rescind the purchase of said foreign drafts and pretended bills of lading and have duly demanded and do hereby again demand that said bankrupts and said Trustee account for said moneys of said Knauth, Nachod & Kuhne, amounting to Ninety-eight thousand five and 58/100 dollars ($98,005.58) and for the cotton purchased and redeemed

46 therewith and for the cotton purchased and redeemed with the fund or bank credit, including said moneys and for the proceeds thereof. Said bankrupts and said Trustee have refused said demands. The assets of said bankrupts amount to only about Six hundred thousand dollars ($600,000.) while their liabilities amount to about Five million ninety thousand one hundred seventy-three and 84/100 dollars ($5,090,173.84). The complainants, Knauth, Nachod & Kuhne, have no adequate remedy at law. Neither the defendants Westphalen & Company nor any other creditors of the bankrupts have any right to payment out of the moneys of said Knauth, Nachod & Kuhne or the proceeds thereof.

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FOURTH—NON-PARTIES.

The members of the firm of Knight, Yancey & Company, hereinbefore mentioned, though they may appear to be proper parties, are not made parties to this bill because they are not within the Northern District of Florida, the territorial jurisdiction of the Court.

FIFTH—PRAYER.

The complainants, Knauth, Nachod & Kuhne, hereby consent that the answer filed July 31, 1911, by the defendant, Louisville & Nashville Railroad Company to their original bill of complaint herein, stand as an an-
48 swer to this amended bill and waive an answer under oath or affirmation by any defendant and pray for the determination and decree of the Court, as follows:

1. That the complainants, Knauth, Nachod & Kuhne, have duly rescinded the purchase by them of the foreign drafts and bills of lading hereinbefore set forth; and that the bankrupts, Knight, Yancey & Company, received and held certain remittances of money from New York, including the moneys of said complainants, aggregating the sum of $98,005.58, and held said moneys of said complainants in trust for their benefit and held the entire

remittances of which said moneys were a part subject to 49
a trust or charge for the benefit of said complainants, to the extent of said sum of $98,005.58 and interest thereon from April 18, 1910.

2. That said bankrupts disbursed the moneys of said complainants and the entire fund or bank credit of which said moneys became a part in the purchase and redemption of certain cotton or the bills of lading therefor and then held said cotton or said bills of lading subject to a trust or charge for the benefit of said complainants, to the extent of said sum $98,005.58 and interest thereon from April 18, 1910.

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3. That Schedule 1 hereto annexed includes certain bales of cotton which, or the bills of lading for which, were purchased and redeemed with the moneys of said complainants and, on proof thereof, what bales or part of the cotton set forth in said schedule were purchased or redeemed with the moneys of said complainants and what bales or part with the fund or bank credit of which the moneys of said complainants became a part; that a trust or charge in favor of said complainants be impressed on the proceeds of the cotton set forth in Schedule 1 hereto annexed, to the extent that said cotton or the bills of lading therefor were purchased or redeemed with the moneys of said complainants or with the fund 51
or bank credit of which said moneys became a part; and that, to the end that said trust or charge be enforced, the defendants pay to said complainants the amount thereof out of the proceeds of said cotton.

4. That the defendant, William S. Lovell as Trustee in Bankruptcy of Knight, Yancey & Company, has acquired or claims the cotton which, or the bills of lading for which, was or were purchased and redeemed with the moneys of said complainants and with the fund or bank credit of which the moneys of said complainants were a

52 part; that said defendant render an account of said moneys of said complainants, aggregating the sum of Ninety-eight thousand five and 58/100 dollars ($98,005.58), and set forth a full, true and particular account of all and singular the cotton or other property that was purchased or redeemed therewith and of the cotton or other property that was purchased or redeemed with the fund or bank credit of which said moneys were a part; and that said account set forth the marks of the bales of cotton and what has become of the same and the value of any part thereof set forth in Schedule 1 hereto annexed.

53 5. That this bill of complaint be heard and determined in connection with the bill of complaint of the defendants Westphalen & Company (against the defendant William S. Lovell as Trustee in Bankruptcy of Knight, Yancey & Company and the defendant Louisville & Nashville Railroad Company) in the late United States Circuit Court for the Northern District of Florida, the bill herein before mentioned.

6. That the complainants, Knauth, Nachod & Kuhne, have such other, further and different relief as justice, equity and the circumstances of the case may require.

REEVES & WATSON,
Solicitors for Complainants,
54 Pensacola, Florida.

BRIESEN & KNAUTH,
Of Counsel for Complainants,
25 Broad Street,
New York, N. Y.

W. H. WATSON,
Of Solicitors and of Counsel for Complainants.

STATE OF NEW YORK,
County of New York. } ss.:

AREND H. WEINGARDT, being duly sworn, says:

That he is a member of the firm of Knauth, Nachod & Kuhne, the complainants in the foregoing Bill; that the complainants were co-partners pleading together and that he is authorized to make verification on behalf of his co-partners as well as on behalf of himself. That he has heard read the foregoing Bill and knows the contents thereof and that the same is true to his own knowledge except as to the matters therein stated to be alleged on information and belief and that as to those matters he believes it to be true, except that the membership of said firm is set forth as of the time when the suit was instituted.

AREND H. WEINGARDT.

Sworn to before me this
17th day of April, 1914.

FRANK F. KIRKPATRICK,
Notary Public, New York County.

58

SCHEDULE 1.

Cotton at Pensacola claimed by Westphalen & Company (through Scheuch & Company), the proceeds of which have been received by the Trustee (except the 100 bales marked QHYO, or GHYO, replevied by the Peoples Bank & Trust Company of Selma, Alabama); some of which cotton is subject to a trust or charge in favor of Knauth, Nachod & Kuhne:

Bales.	Marks.	Original Marks.	Shipper or place of Shipment.
100	QLEF	50 QLEF	Knight, Yancey & Co., Selma.
		50 QLEF	Thompson & Wallace
59		—	
50	PBRA	12 PBRA	Knight, Yancey & Co., Selma.
		38 PBR	Thompson & Wallace
		—	
100	PINC	63 PINC	Knight, Yancey & Co , Selma.
		37 PINC	Thompson & Wallace
100	QTRI	25 QTRI	Knight, Yancey & Co., Selma.
		75 OTRI or QTRI	Thompson & Wallace
100	QEST or QUST	25 QEST	Knight, Yancey & Co., Selma.
		75 QEST	Thompson & Wallace
		—	
100	QEAU	25 QEAU	Knight, Yancey & Co., Selma.
		75 QEAU	Thompson & Wallace
		—	
100	PNCE	15 PNCE	Knight, Yancey & Co., Selma.
60		85 PNCE	Knight, Yancey & Co., Mobile.
		—	
100	PWIT or PNFT or PWTT	15 PWIT, etc.	Knight, Yancey & Co., Selma.
		85 PWIT	Knight, Yancey & Co., Mobile.
		—	
100	QURR or OURR	15 QURR or OURR	Knight, Yancey & Co., Selma.
		85 QURR or OURR	Knight, Yancey & Co., Mobile.
		—	
100	QEQS	15 QEQS	Knight, Yancey & Co., Selma.
		85 QEQS	Knight, Yancey & Co., Mobile.
		—	
100	QTOF	15 QTOF	Knight, Yancey & Co,, Selma.
		85 QTOF	Knight, Yancey & Co., Mobile.

Bales.	Marks.	Original Marks.		Shipper or place of Shipment.	
100	PCON	15	PCON	Knight, Yancey & Co., Selma.	61
		85	PCON	Knight, Yancey & Co., Mobile.	
100	QLLE	15	QLLE	Knight, Yancey & Co., Selma.	
		85	QLLE	Do. , Mobile.	
100	QSEI or QSSE	15	QSEI or QSEE	Do. , Selma.	
		85	QSSE or QSEI	Do. , Mobile.	
100	QRDA	15	QRDA	Do. , Selma.	
		85	QRDA	Do. , Mobile.	
100	PGFA or PFGA	25	PGFA or PFGA	Knight, Yancey & Co., Decatur.	62
		75	PGFA or PFGA	C. Gunter Elmore.	
100	POMP	25	POMP	Knight, Yancey & Co., Selma.	
		75	POMP	Thompson & Wallace (?)	
100	PLIA	25	PLIA	Knight, Yancey & Co., Selma.	
		75	PLIA	Thompson & Wallace.	
100	QHYO or GHYO	75	QHYO or GHYO	Knight, Yancey & Co., Selma.	
		25	QHYO or GHYO	Thompson & Wallace.	
100	RHER	25	RHER	Knight, Yancey & Co., Selma.	
		75	RHER	Thompson & Wallace.	63
1950					

Filed April 20, 1914.

64 **Lovell's Answer and Motion to Dismiss.**

IN THE DISTRICT COURT OF THE UNITED STATES

THE NORTHERN DISTRICT OF FLORIDA.

FRIEDRICH NACHOD *et al.*, Complainants, vs. 65 MAURICE E. A. WESTPHALEN *et al.*, Defendants.	In Equity.

Answer and motion of William S. Lovell, as Trustee, of the estate of Knight, Yancey & Company.

Answering the bill as amended but not waiving the motion and plea hereinafter interposed the defendant, William S. Lovell, as Trustee in bankruptcy of the estate of Knight, Yancey & Company, says:

1. Answering the first and second subdivisions of paragraph first this respondent says that the names, residences, etc., of the parties are correctly therein given; 66 hence he admits the averments of said first paragraph.

2. Answering the first subdivision of the second paragraph this respondent says that the averments thereof are true.

The averments of the second subdivision of the second paragraph are true except as hereinafter denied and qualified. The suit of Knauth, Nachod & Kuhne therein referred to was not instituted until after the cotton which was claimed both by the Trustee in bankruptcy of Knight, Yancey & Company and Westphalen & Company, had been sold. The proceeds of such cotton were,

by the agreement of the parties to the litigation involving 67
it, held to abide solely the result of such litigation. Neither Westphalen & Company or any member of said firm, nor said trustee in bankruptcy of Knight, Yancey & Company resided within the jurisdiction of this court at the time of the institution of said suit of Knauth, Nachod & Kuhne, nor were the objects of said suit of Knauth, Nachod & Kuhne in any wise germane to the purposes of the suit of Westphalen & Company against said Lovell as Trustee, nor did the Circuit Court of the United States in which said suit of Knauth, Nachod & Kuhne was instituted have any jurisdiction over the person of necessary defendants thereto, namely, Westphalen & Company and said Lovell, Trustee, nor was there any 68
res in the custody of such Circuit Court or being administered thereby. It is denied that the proceeds of said cotton remain on deposit in the First National Bank of Pensacola, Florida, and the American National Bank of Pensacola, Florida, or either of them.

Answering the third subdivision of the second paragraph this respondent says that the complainants, Knauth, Nachod & Kuhne, regardless of what they assert, have no interest in the cotton claimed by Westphalen & Company and by said Lovell as trustee or in the proceeds thereof. As before stated no property was within the district at the time the suit was instituted, the situs of the bank deposit referred to in the bill being at the residence 69
of the person in whose name such deposit was made; nor had the Circuit Court of the United States, in which the suit of complainants was instituted, ever impounded the alleged subject matter of this suit.

So that this respondent says that this court had not nor has it any jurisdiction to hear and determine the asserted claim of complainants to the bank deposit referred to in the bill.

3. The averments in the first subdivision of the third paragraph of the bill are admitted.

This respondent has no knowledge of the averments of

70 fact contained in the second, third, fourth and fifth subdivisions of paragraph three of the bill hence the averments thereof are denied. The transactions therein referred to in so far as they involve the obtaining of money by Knight, Yancey & Company by fraud, the essential elements of which was the issuance by them of forged or pretended bills of lading of carriers correspond to a system of frauds carried on by said Knight, Yancey & Company through a long period of years to-wit five years. As a result of such frauds certain banks and foreign purchasers of cotton suffered losses of approximately five million dollars which constitute practically all the claims against their bankrupt estate, so that if complainants
71 suffered the losses which they aver they did suffer, their losses are not different in kind from those of substantially all of the other creditors of said bankrupt estate.

So far as the averments in the subdivisions last referred to as well as in subdivision six in said paragraph three, to the effect that Knight, Yancey & Company deposited the drafts on Van Gerpen together with the foreign exchange therein referred to for collection, are concerned, this respondent says it is wholly immaterial whether such drafts and foreign exchange were deposited for collection or were forthwith discounted by the bank at Decatur. It appears from the averments of the bill and if it does not such is nevertheless the fact that prior
72 to the deposit with the Decatur bank of said drafts and foreign exchange or contemporaneously therewith Knight, Yancey & Company obtained from said Decatur bank the approximate amount of such drafts on Van Gerpen and used the same in the purchase of cotton or for other purposes; so that when such foreign exchange was sold in New York and the proceeds thereof remitted such proceeds necessarily went to reimburse said Decatur bank and never became subject to the control or disposition of Knight, Yancey & Company; so that furthermore it would be impossible for the money of the person or bank in New York, which went to purchase said drafts, to be the same money as that Knight, Yancey & Company had pre-

viously used in the purchase of cotton, or to have identity 73
with the money of such purchase.

Answering the averments of the seventh subdivision of the third paragraph of the bill, the averments thereof are wholly untrue and have no foundation whatever in fact. As will appear from the averments of the third subdivision of the third paragraph of the bill it is averred that the draft drawn by the bankrupts with forged bill of lading thereto attached were dated from the 8th to 11th of April, 1910; and all of the cotton claimed both by Westphalen & Company and Lovell, Trustee, and referred to in the schedules to the bill was purchased and paid for by the bankrupts at intervals between March 9, 1910 and March 26, 1910 prior to the time that com- 74
plainants suffered the losses which they alleged they suffered no lien or charge of any sort, kind or description rested on such cotton so that it was impossible, whether the complainants suffered the losses referred to by them or not, and whether the money alleged to have been obtained from them by fraud was used by the bankrupts in the purchase of cotton, it was not used and could not have been used in the purchase of the cotton referred to in the schedules to the bill. None of complainant's money was used in the redemption of any of said cotton whatever may be meant by the charge in the bill that the complainants money was used in the purchase and redemption of certain cotton. Moreover re- 75
spondent says that if complainants' money had been used in the purchase of certain cotton that before complainants would be entitled to establish a charge thereon or subject such cotton to the reimbursement of them for their losses, it would be necessary for complainants to identify the cotton into which their money went, and as appears from the averments of said seventh subdivision of said third paragraph they do not attempt to do this but merely aver that their money was disbursed in the purchase and redemption of certain cotton "including a part of the cotton or the bills of lading therefor set

76 forth in schedule one hereto annexed." This respondent expressly denies that the cotton referred to in schedule one includes any cotton or the bills of lading therefor that was purchased or redeemed with the moneys of Knauth, Nachod & Kuhne. This respondent further denies that the proceeds of the cotton set forth in schedule one remain on deposit at Pensacola, Florida and denies that the proceeds of the cotton referred to are the proceeds of money obtained by false pretenses from complainants.

The averments of the 8th subdivision of the third paragraph are admitted.

With reference to the averments in the ninth subdivision of the third paragraph of the bill the conclu-
77 sions of law therein drawn are at variance with the law as declared by the Circuit Court of Appeals of this Circuit in the case of Lovell, Trustee *v.* Isadore Newman & Son, which involved an identical state of facts with that involved in the controversy between said Lovell, Trustee, and said Westphalen & Company, with reference to the cotton involved in this bill. Under the decision in that case as applied to the facts of this case title to the cotton referred to in the bill would be in Westphalen & Company and not in said Lovell, Trustee, hence this respondent deems it unnecessary to discuss the conclusions of law referred to in said ninth subdivision.

The averments of the 10th subdivision of said para-
78 graph three are admitted.

The averments of the eleventh subdivision of the third paragraph are expressly denied. This respondent has no knowledge as to whether or not the bankrupts obtained the money of complainants by fraud, the conclusions of law therein set forth, if it be necessary for respondent to answer the [same], are denied and this respondent says since it appears from the averments of said eleventh subdivision in connection with the averments of the balance of the bill that the money which complainants charge they were defrauded of did not come into the hands of the trustee in bankruptcy and did not remain

with Knight, Yancey & Company but was disbursed by 79
them in the purchase of property which complainants are unable to identify that complainants are not entitled to any charge or lien on any larger mass of property. It is true that the assets of the bankrupt estate only amount to about six hundred thousand dollars as charged in the bill, while the liabilities thereof are more than five million dollars. The assets consist of the remnants of property left as the residuum of the frauds systematically carried on by the bankrupts through a period of years. Neither the money of complainants nor of any one else can be traced therein and this respondent says that such assets of said bankrupt estate should be equally and ratably distributed among those who suffered in like 80
way as a result of the frauds of Knight, Yancey & Company, no one of such persons so suffering being entitled on any legal theory or pretense to any priority of payment over any other.

4. Answering the fourth paragraph of the bill the averments thereof are admitted except the conclusion that the bankrupts are not necessary parties to the case.

This respondent says that the bill is insufficient in point of law, and moves the court to dismiss the same on the following grounds:

1. The bill, regarded as a bill of intervention is not 81
in subordination to and in recognition of the propriety of the suit of Westphalen & Company against the respondent as Trustee in Bankruptcy of Knight, Yancey & Company, *et al.*

2. The purposes of the bill, regarded as a bill of intervention are not germane to those of the suit of Westphalen & Company against the respondent as Trustee in the bankruptcy of Knight, Yancey & Company, *et al.*

3. The bill may not be maintained as an original bill because at the time this suit was brought there was no

82 personal jurisdiction of the court over the defendants, Westphalen, and the respondent; nor was the property the subject matter of the suit within the court's jurisdiction, or in its custody.

4. Complainants show no right, title or interest in any of the property the subject matter of the suit, nor any right to personal relief against any defendant.

5. It does not appear that the money of the complainants ever passed into the custody or control of the bankrupts or was ever disbursed by them in the purchase of cotton but on the contrary it appears that such money
83 went to reimburse the First National Bank of Decatur or other Decatur bank for advances made by them to Knight, Yancey & Company with which advances the cotton referred to in the bill was purchased.

6. It does not appear with sufficient certainty that the money of complainants ever passed into the control of or became subject to the disposition of the bankrupts.

7. It affirmatively appears from the bill that the money of the complainants did not pass into the hands of the Trustee in bankruptcy but that such money was disbursed by the bankrupts or at their instance in the
84 purchase or redemption of cotton and the cotton so purchased or redeemed is not identified but on the contrary it appears that such cotton was merely a part of a larger mass, so that complainants would not be entitled to maintain the bill.

8. Because the bill is vague, uncertain and contradictory in its averments as to whether or not the money which was used in the purchase or redemption of the cotton referred to in the bill was money advanced to the bankrupts by the First National Bank of Decatur or other Decatur bank prior to the time that complainants parted with their money or whether the money of com-

plainants passed into the custody of the bankrupts free of any right on the part of such bank to retain the same. 85

9. The bill is without equity.

10. And for matter in abatement this respondent says that this bill ought not to be maintained because prior to the institution of this suit the cotton therein referred to, constituting the subject matter of the suit of Westphalen & Company against this respondent, had, by agreement, between Westphalen & Company and this respondent, as such Trustee been sold and the proceeds thereof deposited in banks at Pensacola, Florida to abide the result of the litigation between Westphalen & Company and this respondent and for no other purpose; that neither such cotton nor the proceeds thereof were ever impounded nor in any sense in the custody of the Circuit Court of the United States in which the bill of complainants against this respondent and others was filed; that none of the property referred to in the bill was within the jurisdiction of the court at the time the suit was brought; that the bank deposits referred to, so far as the suits thereof is concerned, followed the residence of the depositors which was not within the jurisdiction of this court; that Maurice E. A. Westphalen and Mme. McLeod Westphalen were at the time of the institution of this suit and still are residents of France and that said William S. Lovell was at the time of the institution of this suit and still is a resident of the State of Alabama; that none of the bankrupts at the time of the institution of this suit resided, nor have they since resided within the jurisdiction of this court; and that the administration of the bankrupt estate of Knight, Yancey & Company was at the time of the institution of this suit and is now pending in the Northern District of Alabama and that neither the said Westphalen nor this respondent have been served or can properly be served with process to answer the bill. 86 87

PERCY, BENNERS & BURR,
BLOUNT & BLOUNT & CARTER,
Solicitors for William S. Lovell,
Trustee in Bankruptcy of Knight,
Yancey & Company.

88 STATE OF ALABAMA:
Jefferson County:

WILLIAM S. LOVELL being duly sworn deposes and says that the statements of fact contained in the paragraph immediately foregoing are true.

WILLIAM S. LOVELL.

Subscribed and sworn to before me this the 20th day of August 1914.

ANNIE L. PEACE,
Notary Public.

Filed August 22, 1914.

89

Westphalen & Co.'s Motion to Dismiss.

IN THE DISTRICT COURT OF THE UNITED STATES,

THE NORTHERN DISTRICT OF FLORIDA.

FRIEDRICH NACHOD, *et al.*, Complainants, vs. 90 MAURICE E. A. WESTPHALEN, *et al.*, Defendants.	In Equity.

Maurice E. A. Westphalen and Madame McLeod Westphalen *in commendam,* copartners as Westphalen & Company, two of the defendants to the amended bill of complaint herein filed, appearing for the special purpose and no other, until the question herein raised is decided move the Court to dismiss the said amended bill on the following grounds:—

1. The bill regarded as a bill of intervention is not in subordination to and in recognition of the propriety

of the suit of these respondents against the defendant Lovell, Trustee in Bankruptcy of Knight Yancey & Company; 91

2. The purposes of the bill, regarded as a bill of intervention, are not germane to those of the suit of these respondents against the defendant Lovell as Trustee as aforesaid;

3. The bill may not be maintained as an original bill because at the time this suit was brought there was no personal jurisdiction of the Court over these respondents, and the defendant Lovell as Trustee as aforesaid, nor was the property the subject matter of the suit within the Court's jurisdiction or in its custody; 92

4. Complainants show no right, title or interest to any of the property the subject matter of the suit, nor any right to personal relief against any defendant;

5. It does not appear that the money of the complainants ever passed into the custody or control of the bankrupts or was ever disbursed by them in the purchase of cotton but on the contrary it appears that such money went to reimburse the First National Bank of Decatur or other Decatur Bank for advances made by them to Knight, Yancey & Company with which advance the cotton referred to in the bill was purchased; 93

6. It does not appear with sufficient certainty that the money of complainants ever passed into the control of or became subject to the disposition of the bankrupts;

7. It affirmatively appears from the bill that the money of the complainants did not pass into the hands of the Trustee in bankruptcy but that such money was disbursed by the bankrupts or at their instance in the purchase or redemption of cotton and the cotton so purchased or redeemed is not identified but on the contrary it appears that such cotton was merely a part of a larger mass, so

94 that complainants would not be entitled to maintain the bill;

8. Because the bill is vague, uncertain and contradictory in its averments as to whether or not the money which was used in the purchase or redemption of the cotton referred to in the bill was money advanced to the bankrupts by the First National Bank of Decatur or other Decatur Bank prior to the time that complainants parted with their money or whether the money of complainants passed into the custody of the bankrupts free of any right on the part of such bank to retain the same.

95 9. The bill is without equity.

10. And for matter in abatement the said Lovell, Trustee, says that this bill ought not to be maintained because prior to the institution of this suit the cotton therein referred to, constituting the subject matter of the suit of Westphalen & Company against the said Lovell, Trustee, had, by agreement, between Westphalen & Company and the said Lovell, Trustee, been sold and the proceeds thereof deposited in banks at Pensacola, Florida to abide the result of the litigation between Westphalen & Company and this respondent and for no other purpose; that neither such cotton nor the proceeds thereof were
96 ever impounded nor in any sense in the custody of the Circuit Court of the United States in which the bill of complainants by these respondents was filed; that none of the property referred to in the bill was within the jurisdiction of the court at the time the suit was brought; that the bank deposits referred to, so far as the situs thereof is concerned, followed the residence of the depositors which was not within the jurisdiction of this court; that Maurice E. A. Westphalen and Mme. McLeod Westphalen were at the time of the institution of this suit and still are residents of France and that said William S. Lovell was at the time of the institution of this suit and still is a resident of the State of Alabama; that

none of the bankrupts at the time of the institution of this suit resided, nor have they since resided within the jurisdiction of this court; and that the administration of the bankrupt estate of Knight, Yancey & Company was at the time of the institution of this suit and is now pending in the Northern District of Alabama and that neither the said Westphalens nor the said Lovell, Trustee have been served or can properly be served with process to answer the bill. 97

E. C. MAXWELL,
Solicitor for said defendants.

Filed August 22, 1914.

98

Complainants' Objections to Motions.

DISTRICT COURT OF THE UNITED STATES,

NORTHERN DISTRICT OF FLORIDA.

FRIEDRICH NACHOD and others,
Complainants,

AGAINST

MAURICE E. A. WESTPHALEN and others,
Defendants.

99

The complainants, Knauth, Nachod & Kuhne, object to the motion of the defendant Lovell as Trustee, to dismiss the amended bill of the complainants, and to the motion of the defendants Westphalen, to dismiss the amended bill of the complainants. Without waiving

100 other grounds of objection, the complainants specify the following objections to each of said motions:

1. So far as either of said motions is based both on a want of jurisdiction and a want of equity, said grounds are repugnant and exclusive. A motion to dismiss for want of jurisdiction admits the cause of action alleged in the amended bill and errors or defects, if any, must be disregarded, because they are curable by amendment (Rules 19 and 28, Present Equity Rules) and because to predicate a want of jurisdiction is to predicate a want of power to pass on the merits of the amended bill. A motion to dismiss for want of equity admits jurisdiction and asks the Court to pass on the merits of the amended
101 bill.

2. The Court has already determined that it has jurisdiction (upon defendants' motions to quash service of process and to dismiss the original bill of complaint) and is not authorized to review its own decisions in that regard.

3. None of the defendants has a right to have his or their motion to dismiss, on the ground of a want of equity, called up and disposed of before final hearing. None of them has answered the amended bill, except the defendant Lovell as Trustee, or waived his or their right to
102 answer the same or conceded the claim of the complainants (except for the purpose of his or their motion) and the Court is not in a position to exercise a discretion under Rule 29 of the present Equity Rules to allow either of said motions to be called up and disposed of before final hearing. Said discretion should be exercised, complainants submit, only in case the controlling facts in the case are conceded for all purposes, either by answer or otherwise, so that a disposal of the points of law presented will be necessary and will, in effect, finally dispose of the whole or a material part of the cause of action, whether in favor of complainants or defendants.

4. The application to dismiss the amended bill, for want of jurisdiction, is in effect an application to have the government of the United States, acting through its judicial department, deprive the complainants of their property without due process of law, in contravention of Amendment V and other provisions of the Constitution of the United States. The construction and application of the constitutional inhibition was involved in the original proceedings set forth in the amended bill of complainants, as well as in this case. The relief sought in said original proceedings gave the Court exclusive jurisdiction and that carried with it the jurisdiction and duty to hear and determine and enforce the rights of all claimants of the property impounded and sequestered. To disclaim said ancillary jurisdiction or duty is to violate said constitutional inhibition. 103 104

5. The grounds, on which each of said motions is made, are not in accord with the allegations of the amended bill and are untenable in point of law.

Dated April 14, 1915.

WATSON & PASCO,
Solicitors for Complainants,
Pensacola, Florida.

BRIESEN & KNAUTH,
Counsel for Complainants,
25 Broad Street,
New York, N. Y. 105

W. H. WATSON,
Of solicitors and counsel for Complainants.

Filed July 10, 1915.

106 **Order of Dismissal.**

IN THE DISTRICT COURT OF THE UNITED STATES,

NORTHERN DISTRICT OF FLORIDA.

FRIEDRICH NACHOD, MAX JAFFE, WILHELM KNAUTH, AUGUST STERN, OSCAR L. GUBELMAN, AREND H. WEINGARDT, ROLLIN C. NEWTON, MARY W. KNAUTH, and PERCIVAL KUHNE, partners as Knauth, Nachod &
107 Kuhne,
Complainants,

vs.

MAURICE E. A. WESTPHALEN, MME. McLEOD WESTPHALEN (the latter *in commendam*), composing the firm of Westphalen & Company; and WILLIAM S. LOVELL, as Trustee in Bankruptcy of the estate of Knight, Yancey & Company; and Louisville & Nashville Railroad Company,
Defendants.

In Equity.

108 The above styled and entitled cause coming on for hearing on the motions filed by the defendants, Wm. S. Lovell, as Trustee in Bankruptcy, and Westphalen & Company to dismiss the amended bill of complaint, and on the objections of the complainant to said motions, and same having been argued by counsel for the respective parties,

It is ordered that the objections to said motions be and are overruled.

And the Court having considered said motions to dismiss and the said amended bill, and being of the opinion that this court is without jurisdiction of the subject matter of the litigation, and that the proper forum for the

relief sought by the complainant is the bankruptcy court 109
of the Northern District of Alabama, it is therefore ordered that said amended bill be and it is hereby dismissed at the cost of the complainants.

Done and ordered at Pensacola, Florida, this 10th day of July, 1915.

WM. B. SHEPPARD,
District Judge.

Filed July 10, 1915.

Assignment of Errors.

110

DISTRICT COURT OF THE UNITED STATES,

NORTHERN DISTRICT OF FLORIDA.

FRIEDRICH NACHOD and others,
Complainants,

AGAINST

MAURICE E. A. WESTPHALEN and others,
Defendants.

111

The complainants, Knauth, Nachod & Kuhne, being about to ask for the allowance of an appeal to the Supreme Court of the United States from the order or decree of this Court made and entered herein on or about the 10th day of July, 1915, hereby make the following assignment of errors in the said order and in the proceedings of the Court:

1. The District Court erred in dismissing the amended bill of complaint of the complainants, Knauth, Nachod & Kuhne. It had impounded and taken possession of

property which equitably belonged to said complainants and holds the proceeds thereof.

Its jurisdiction is exclusive of all other tribunals. The said complainants are entitled to have their claim to said property and its proceeds heard and determined herein and the said order or decree, dismissing their bill for want of jurisdiction, deprives them of their property without due process of law, in contravention of Amendment V and other provisions of the Constitution of the United States.

2. The District Court erred in holding that the property in question is *in custodia legis* of the bankruptcy court for the Northern District of Alabama. Said bankruptcy court has never had possession or jurisdiction thereof. Said property had been transferred by the bankrupts and was held adversely to their Receivers and to their Trustee. The conditions on which said transfer is voidable must be established and the transfer must be set aside before said bankruptcy court will have any jurisdiction of the same.

3. The District Court erred in holding the law against the complainants, Knauth, Nachod & Kuhne. The order or decree dismissing the amended bill of said complainants is contrary to the facts admitted in the cause and contrary to law and contrary to equity.

WATSON & PASCO,
Solicitors for complainants,
Pensacola, Florida.

BRIESEN & KNAUTH,
Counsel for Complainants,
25 Broad Street,
New York, N. Y.

W. H. WATSON,
Of Solicitors and Counsel.

Filed July 10, 1915.

Appeal.

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DISTRICT COURT OF THE UNITED STATES,

NORTHERN DISTRICT OF FLORIDA.

FRIEDRICH NACHOD and others,
Complainants,

AGAINST

MAURICE E. A. WESTPHALEN and others,
Defendants.

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The complainants, Max Jaffe, Wilhelm Knauth, August Stern, Oscar L. Gubelman, Arend H. Weingardt, Rollin C. Newton, Mary W. Knauth and Percival Kuhne (being the survivors of themselves and Friedrich Nachod, deceased, and with him formerly composing the firm of Knauth, Nachod & Kuhne) conceive themselves aggrieved by the order or decree made and entered, in the above entitled cause, on the 10th day of July, 1915, and do hereby appeal from said order or decree to the Supreme Court of the United States, for the reasons set forth in the assignment of errors which is presented and to be filed herewith. The appeal is taken to said Supreme Court, pursuant to Sec. 238 of The Judicial Code, because the jurisdiction of the above named court is in issue and the case involves the construction and application of the Constitution of the United States and draws in question the constitutionality of certain laws of the United States. That is to say the record presents the question whether the laws authorizing the court to impound and hold the property in question, under the facts and circumstances of the case, are not unconstitutional

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and void unless they also vest it, either expressly or by necessary implication, with jurisdiction to hear and determine the claim of the complainants to said property.

WHEREFORE the said complainants pray that this appeal be allowed; and that a transcript of the record of the proceedings and papers on which said order or decree was made be duly authenticated and sent to the Supreme Court of the United States.

WATSON & PASCO,
Solicitors for Complainants,
Pensacola, Florida.

BRIESEN & KNAUTH,
Counsel for Complainants,
25 Broad Street,
New York, N. Y.

W. H. WATSON,
Of Solicitors and Counsel.

IT IS ORDERED that the foregoing appeal be and hereby is allowed as prayed for.

Dated this 10th day of July, 1915.

WM. B. SHEPPARD,
District Judge.

Filed July 10, 1915.

Bond on Appeal.

121

DISTRICT COURT OF THE UNITED STATES OF AMERICA,

FOR THE NORTHERN DISTRICT OF FLORIDA.

FRIEDRICH NACHOD, MAX JAFFE and others, formerly composing the firm of KNAUTH, NACHOD & KUHNE,
Complainants,

vs.

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MAURICE E. A. WESTPHALEN and others,
Defendants.

KNOW ALL MEN BY THESE PRESENTS, That Knauth, Nachod & Kuhne, as principal, and NATIONAL SURETY COMPANY, a corporation under the laws of the State of New York, with its principal place of business at No. 115 Broadway, in the City, County and State of New York, as surety, are held and firmly bound unto the above named Maurice E. A. Westphalen, Madam McLeod Westphalen and William S. Lovell as Trustee in Bankruptcy of 123
Knight-Yancey & Company, in the sum of Five Hundred ($500.00) Dollars to be paid to the said obligees, their executors, administrators, successors or assigns, for the payment of which well and truly to be made, said principal and surety bind themselves, their heirs, executors, administrators and assigns, jointly and severally, firmly by these presents. Sealed and dated the 6th day of July, 1915.

WHEREAS, the above named Knauth, Nachod & Kuhne, have prosecuted an appeal to the Supreme Court of the

124 United States, to reverse the order or decree rendered in the above entitled suit, by a Judge of the District Court of the United States for the Northern District of Florida,

NOW, THEREFORE, the condition of this obligation is such, that if the above named Knauth, Nachod & Kuhne, shall prosecute said appeal to effect, and answer all damages and costs if they fail to make said appeal good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

KNAUTH, NACHOD & KUHNE,
By GEO. T. HOGG, of Counsel.
NATIONAL SURETY COMPANY,
125 By WM. A. THOMPSON,
Resident Vice-President.

Attest:
N. V. TYNAN,
[SEAL] Resident Assistant Secretary.

AFFIDAVIT, ACKNOWLEDGMENT, AND JUSTIFICATION BY GUARANTEE OR SURETY COMPANY.

STATE OF NEW YORK }
County of New York } ss.:

126 On this 6th day of July one thousand nine hundred and fifteen before me personally came WM. A. THOMPSON, known to me to be the Resident Vice-President of the NATIONAL SURETY COMPANY, the corporation described in and which executed the within and foregoing Bond of Knauth, Nachod & Kuhne, as a surety thereon, and who, being by me duly sworn, did depose and say that he resides in the City of New York, State of New York; that he is the Resident Vice-President of said Company, and knows the corporate seal thereof; that the said NATIONAL SURETY COMPANY, is duly and legally incorporated under the laws of the State of New York; that said Company has complied with the provisions of the

Act of Congress of August 13th, 1894; that the seal 127
affixed to the within Bond of Knauth, Nachod & Kuhne is the corporate seal of said National Surety Company, and was thereto affixed by order and authority of the Board of Directors of said Company; that he signed his name thereto by like order and authority as Resident Vice-President of said Company; that he is acquainted with N. V. Tynan, and knows him to be the Resident Assistant Secretary of said Company; that the signature of said N. V. Tynan subscribed to said Bond is in the genuine handwriting of said N. V. Tynan, and was thereto subscribed by order and authority of said Board of Directors, and in the presence of said deponent; that the assets of said Company, unencumbered and liable 128
to execution exceed its debts and liabilities of every nature whatsoever, by more than the sum of Three Million Five Hundred Thousand ($3,500,000.) Dollars.

That R. R. Turnbull, at Pensacola, Florida, is agent to acknowledge service for said Company in the Judicial District wherein this bond is given.

WM. A. THOMPSON.

Sworn to, acknowledged before me, and subscribed in my presence this 6th day of July, 1915.

P. P. MARCONE,
[SEAL] Notary Public, &c., No. 2380.

Approved July 10, 1915. 129

WM. B. SHEPPARD, District Judge.

Filed July 10, 1915.

130 **Citation.**

DISTRICT COURT OF THE UNITED STATES,

NORTHERN DISTRICT OF FLORIDA.

FRIEDRICH NACHOD and others,
Complainants,

AGAINST

MAURICE E. A. WESTPHALEN and others,
131 Defendants.

THE PRESIDENT OF THE UNITED STATES OF AMERICA,

To Maurice E. A. Westphalen and Madam McLeod Westphalen (the latter *in commendam*) composing the firm of Westphalen & Company; and William S. Lovell as Trustee in Bankruptcy of Knight, Yancey & Company—GREETING:

YOU ARE HEREBY CITED and admonished to be and
132 appear in the Supreme Court of the United States, at the City of Washington in the District of Columbia, thirty days after the date of this citation (pursuant to an appeal allowed and filed in the office of the Clerk of the District Court of the United States for the Northern District of Florida, wherein Max Jaffe, Wilhelm Knauth, August Stern, Oscar L. Gubelman, Arend H. Weingardt, Rollin C. Newton, Mary W. Knauth and Percival Kuhne, being the survivors of themselves and Friedrich Nachod, deceased, and with him formerly composing the firm of Knauth, Nachod & Kuhne, are appellants and you are appellees) to show cause, if any there be, why the order

or decree rendered against said appellants, as in said 133
appeal mentioned, should not be reversed and why speedy justice should not be done the parties in that behalf.

WITNESS Hon. WILLIAM B. SHEPPARD, Judge of the District Court of the United States for the Northern District of Florida, this 10th day of July, 1915.

WM. B. SHEPPARD,
District Judge.

Service for W. S. Lovell accepted this July 10, 1915.

PERCY, BENNERS & BURR,
BLOUNT & BLOUNT & CARTER,
Solicitors for Lovell. 134

Service on behalf of Maurice E. A. Westphalen and Mme. McLeod Westphalen, composing Westphalen & Company, is accepted this July 10, 1915.

E. C. MAXWELL,
Solicitor for said defendants.

Filed July 10, 1915.

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Præcipe on Appeal.

DISTRICT COURT OF THE UNITED STATES,

NORTHERN DISTRICT OF FLORIDA.

FRIEDRICH NACHOD and others, Complainants, AGAINST MAURICE E. A. WESTPHALEN and others, Defendants.	In Equity, No. 100. (Of former Circuit Court Docket.)

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Pursuant to rules 75-76 of the present Equity Rules, the complainants Knauth, Nachod & Kuhne hereby indicate the following as the papers to be incorporated in the transcript of record on their appeal to the Supreme Court of the United States from the decree herein of July 10, 1915, to wit:

1. The amended bill of complaint.

2. The answer and motion to dismiss said bill by the defendant Lovell, as Trustee.

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3. The written motion to dismiss said bill by the defendants composing the firm of Westphalen and Company.

4. The written objections by complainants to said motions.

5. The decree dismissing said bill.

6. The assignment of errors.

7. The appeal and the allowance thereof. 139

8. The bond on appeal.

9. The citation on appeal.

WATSON & PASCO,
Solicitors for Appellants,
Pensacola, Florida.

BRIESEN & KNAUTH,
Counsel for Appellants,
25 Broad Street, New York, N. Y.

W. H. WATSON,
Of Counsel. 140

Due service of a copy of the foregoing *præcipe* is admitted this 28th day of July, 1915.

PERCY, BENNERS & BURR,
BLOUNT & BLOUNT & CARTER,
Solicitors and of Counsel for defendant William S. Lovell, as Trustee, etc.
E. C. MAXWELL,
Solicitors and of Counsel for the defendants, members of the firm of Westphalen & Company. 141

Filed July 28, 1915.

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Order of Enlargement.

DISTRICT COURT OF THE UNITED STATES,

NORTHERN DISTRICT OF FLORIDA.

FREIDRICH NACHOD and others,
Complainants,

AGAINST

MAURICE E. A. WESTPHALEN and others,
143 Defendants.

This cause came on to [illegible] heard at this time and was submitted by [illegible] complainants; and thereupon, upon cons[illegible]eof, it was ordered, adjudged and decreed [illegible]llowing, viz.:

That the time for certification and filing of the transcript of the record upon the appeal herein, allowed July 10, 1915, be and the same hereby is extended for the period of thirty days from August 9, 1915.

Dated August 9, 1915.

144 WM. B. SHEPPARD,
District Judge.

We hereby consent to the above order.

PERCY, BENNERS & BURR,
BLOUNT & BLOUNT & CARTER,
Solicitors for defendant Lovell as Trustee etc.
E. C. MAXWELL,
Solicitor for defendants Westphalen.

Filed August 9, 1915.

Further Order of Enlargement.

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IN THE DISTRICT COURT OF THE UNITED STATES,

NORTHERN DISTRICT OF FLORIDA.

FRIEDRICH NACHOD *et al.*,
Complainants,

vs.

MAURICE E. A. WESTPHALEN *et al.*,
Defendants.

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This cause came on to be further heard at this time, and was submitted by counsel for complainant, and thereupon, upon consideration thereof, it was ordered, adjudged and decreed as following, to wit:

That the time for certification and filing of the transcript of the record upon the appeal herein, allowed July 10, 1915, be, and the same is hereby, extended for the period of thirty days from September 6, 1915.

Dated September 4th, 1915.

WM. B. SHEPPARD,
District Judge.

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We hereby consent to the above order.

BLOUNT & BLOUNT & CARTER,
Solicitors for Defendant Lovell,
as Trustee, etc.
E. C. MAXWELL,
Solicitors for Defendants Westphalen.

148 **Authentication of Records.**

UNITED STATES DISTRICT COURT,
Northern District of Florida, } ss.:

I, FREDERICK W. MARSH, Clerk of said Court, do hereby certify that the foregoing is a true and correct transcript of the papers mentioned in the *præcipe* of the complainants in the cause in equity therein set forth and constitute the record and proceedings of this court on the appeal to the Supreme Court of the United States in said cause, no *præcipe* having been filed by any of the defendants, and no opinion in writing having been ren-
149 dered by the District Judge on granting the motions to dismiss; and that said record remains on file in said cause in my office as Clerk of said Court.

IN WITNESS WHEREOF I do hereto set my hand and affix the seal of said court at the City of Pensacola, Florida, this 6th day of September, 1915.

FREDERICK W. MARSH,
Clerk.

[L. S.]

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